

Supreme Court, U.S.

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No. 96-110

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

STATE OF WASHINGTON, CHRISTINE O. GREGOIRE,
Attorney General of Washington,

Petitioners,

v.

HAROLD GLUCKSBERG, M.D.,
ABIGAIL HALPERIN, M.D., THOMA A. PRESTON, M.D., and
PETER SHALIT, M.D., PH.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Should this Court grant certiorari to decide whether the Fourteenth Amendment's guarantee of liberty protects the decision of a mentally competent, terminally ill adult to hasten impending death in a certain, humane, and dignified manner when

1. the only federal appellate court other than the Ninth Circuit to consider the constitutional validity of a statute prohibiting assisted suicide also struck down the prohibition as constitutionally infirm;
2. the single conflicting state court decision on the validity of a statute prohibiting assisted suicide addresses different facts and a statute that has expired;
3. the law continues to be developed by the lower courts; and
4. the Ninth Circuit properly applied this Court's due process precedent?

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STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The State of Washington allows individuals to commit suicide and recognizes a liberty interest in choosing to end a painful and futile existence, at least where that can be done by terminating medical treatment. On the other hand, the State makes it a crime for any person to assist in any way, other than the removal of life-sustaining treatment, in a terminally

ill, mentally competent person's choice to hasten inevitable death and end suffering.

Respondents contend that the United States Constitution's guarantee of liberty protects the right of competent, terminally ill adults to choose to hasten inevitable death and that this necessarily entails medical assistance — in particular, drugs prescribed for that purpose. In addition, respondents contend that the exception to Washington's prohibition, recognized by court and legislature, in the case of persons who can choose to hasten death by directing the termination of medical treatment violates the Equal Protection Clause.

The record in this case establishes the following undisputed facts regarding the original patient plaintiffs and respondents:

At the time this case was filed, Dr. Jane Roe, 69, was dying of breast cancer.¹ Her cancer had metastasized widely into her bones and was growing rapidly throughout her entire skeleton. She had undergone surgery, chemotherapy, and radiation therapy, but the cancer prevailed. Dr. Roe suffered chronic, intractable pain, which she attempted to alleviate with large and increasing doses of morphine; however, she still experienced frequent and severe pain. Dr. Roe was confined to bed for the seven months prior to the filing of this action. Movement was intensely painful, and her weakened muscles could not support her. She was anemic, incontinent, and vulnerable to infections.

Dr. Roe was a mentally competent retired physician. She had been advised and understood that there was no chance of recovery and that despite excellent medical care she faced severe and unrelenting suffering. Dr. Roe wished to hasten her

inevitable death by taking drugs of a type and in an amount prescribed by her doctor for that purpose. *Compassion*, 79 F.3d at 794-95.

At the time this action was filed, John Doe, 44, was dying of AIDS.² His doctors had advised him that there was no chance of recovery and that he faced severe and continuous suffering. John Doe was vulnerable to all manner of infections with almost no natural ability to fight them. Mr. Doe had cytomegalovirus retinitis, which caused him to lose approximately 70% of his vision at the time this action was filed and was anticipated to result in complete blindness. Loss of vision was fatal to Mr. Doe's vocation and avocation, painting. Mr. Doe had been hospitalized for AIDS-related pneumonia on several occasions, suffered from chronic skin infections, sinusitis, and grand mal seizures related to AIDS, and experienced extreme fatigue and a rapidly diminishing ability to care for himself. Mr. Doe had served as the primary caregiver for his long-term companion who died of AIDS at home in Mr. Doe's care. Mr. Doe witnessed firsthand the pain, suffering, and loss of bodily function, integrity, and personal dignity the disease causes at the end of life.

John Doe was mentally competent and understood his diagnosis and prognosis. John Doe wished to hasten his inevitable death by taking drugs of a type and in an amount prescribed by his doctor for that purpose. *Id.*

At the time this case was filed, James Poe, 69, was dying of chronic, end-stage emphysema.³ His doctors had advised

² Mr. Doe died prior to the district court's decision. *Compassion*, 79 F.3d at 794-95.

³ Mr. Poe died prior to the decision by the three-judge panel of the Ninth Circuit. *Compassion*, 79 F.3d at 794-95.

¹ Dr. Roe died prior to the district court's decision. *Compassion in Dying v. Washington*, 79 F.3d 790, 794-95 (9th Cir. 1996) (en banc).

him that his future held no chance of recovery, only terrible pain and suffering. Every breath was a struggle. He was supplied oxygen through a tube to his nose 24 hours a day and spent hours each day aspirating medications to facilitate breathing. He was terrified by his inability to get enough air. He regularly took medications, including morphine, to calm the panic associated with the sensation of suffocation. He also suffered from associated heart failure, which resulted in painful swelling of his extremities and loss of mobility.

James Poe was mentally competent and understood his diagnosis and prognosis. James Poe desired the right to choose to hasten his inevitable death by taking drugs of a type and in an amount prescribed by his doctor for that purpose when his suffering became unbearable. *Id.*

Respondents Glucksberg, Halperin, Preston, and Shalit are physicians who regularly treat terminally ill patients. Each encounters mentally competent, terminally ill patients who understand their condition, diagnosis, and prognosis and who desire physician assistance in hastening their deaths to avoid prolonged suffering. Each encounters cases in which his or her professional responsibilities dictate that he or she honor mentally competent, terminally ill patients' requests for medication to hasten death. The physicians present both their own claims and the claims of their patients in this action.⁴ *Id.* at 794-96.

In the physicians' professional judgment, the desire of such patients to hasten inevitable death and avoid suffering can be rational. In these cases the appropriate procedure is to ensure competence, to confirm the terminal diagnosis, and to

⁴ The Ninth Circuit correctly held that the physicians had standing to present the claims of their patients. *Compassion*, 79 F.3d at 795-96. See *Doe v. Bolton*, 410 U.S. 179, 187-89 (1973).

prescribe the proper drugs that will allow the patient to decide whether to live, and suffer, any longer. It was undisputed below that patients who cannot receive this medical assistance cannot hasten their deaths in a certain and humane manner and that some cannot hasten their death in any manner without such assistance. The physicians, however, know that prescribing drugs for this purpose exposes them to criminal prosecution under RCW 9A.36.060. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1457-58 (W.D. Wash. 1994).

II. THE LOWER COURTS' DECISIONS

Respondents concur in petitioners' statement of the proceedings below.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS

A. There Is No Conflict Between Federal Circuits

Aside from the Ninth Circuit, the only other federal appellate court to consider the issues presented in this case is the Second Circuit, which also determined that mentally competent, terminally ill patients are constitutionally entitled to seek physician assistance in hastening death in the form of medications prescribed for that purpose. *Quill v. Vacco*, 80 F.3d 716, 727 (2d Cir. 1996), *petition for cert. docketed*, 65 U.S.L.W. 3052 (May 16, 1996) (No. 95-1858). In its decision, the Second Circuit struck down statutes similar to the Washington statute challenged in this case.

Both the Second Circuit and the Ninth Circuit were presented with Fourteenth Amendment liberty and equal protection claims. The Ninth Circuit found that the right to physician assistance in hastening death fell within the bounds

of the liberty interest demarcated by this Court in the reproductive rights cases and *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990). *Compassion*, 79 F.3d at 813-16. Having found a protected liberty interest, the Ninth Circuit declined to address the equal protection claim. *Id.* at 838.⁵

In a unanimous decision, the Second Circuit ruled that New York's law prohibiting physician-assisted suicide violates the Equal Protection Clause. *Quill*, 80 F.3d at 727. The Second Circuit briefly considered the liberty claim and declined to find a constitutionally protected liberty interest absent explicit guidance from this Court.⁶

⁵ Because there is no equal protection ruling to review, the third question presented by petitioners — whether a rational basis exists for distinguishing between the refusal and withdrawal of life-sustaining treatment and the provision of lethal medication such that equal protection guarantees are not impinged — and the related discussion (Petition at 22-26) are not before this Court and cannot be a basis for discretionary review.

Nevertheless, in considering the equal protection issue it is fair to recognize that the Ninth Circuit appreciated the lack of an "ethical or constitutionally cognizable" basis upon which to distinguish between physician assistance in hastening death by the act of prescribing medications for that purpose and the act of withdrawing or withholding life support. *Compassion*, 79 F.3d at 821-24. This recognition is consistent with the reasoning of the only other federal circuit to consider the issue. See *Quill*, 80 F.3d at 727.

⁶ The Second Circuit's reluctance to find a liberty interest was premised upon its conclusion that *Bowers v. Hardwick*, 478 U.S. 186 (1986), directed lower courts to refrain from recognizing previously unrecognized liberty interests, even where this Court's analytical standards have been met. *Quill*, 80 F.3d at 725 ("Our position in the judicial hierarchy constrains us to be even more reluctant than the Court to undertake an expansive approach in this unchartered area.").

Thus, there is no conflict in the results reached by the two federal appellate courts that have considered the constitutionality of state laws that operate to prevent mentally competent, terminally ill adults from choosing to hasten death in a certain, humane, and dignified manner. Rather, there is simply a distinction between the constitutional grounds employed to reach the same result. There is no need for this Court to referee such a theoretical "conflict."

B. There Is No True Conflict Between a Federal Court and a State Court of Last Resort

The Michigan Supreme Court ruling identified by petitioners as giving rise to a conflict is meaningless for purposes of this Court's decision whether to grant review. See *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994), cert. denied, 115 S. Ct. 1795 (1995).⁷

Hardwick did not stand for the absolute admonition perceived by the Second Circuit. As the Ninth Circuit noted, *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992), explicitly reiterates the principle that the fact that a right has not previously been recognized is no barrier to its recognition. *Compassion*, 79 F.3d at 805. This principle was again reaffirmed just this past term in *United States v. Virginia*, 64 U.S.L.W. 4638, 4650 (June 26, 1996) ("A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded."), and is also evident from the rulings subsequent to *Hardwick* that have recognized previously unrecognized liberty interests or reaffirmed previously recognized liberty interests. See, e.g., *Casey*, 505 U.S. 833 (reaffirming the liberty interest in terminating a pre-viable pregnancy); *Cruzan*, 497 U.S. 261 (recognizing a liberty interest in the deeply personal area of end-of-life decision-making); *Washington v. Harper*, 494 U.S. 210 (1990) (recognizing a liberty interest in being free from the arbitrary administration of antipsychotic drugs).

⁷ The only other decision that petitioners rely on as creating a conflict on the liberty issue is a state appellate court decision. Petition at 21.

First, the consolidated cases involving Dr. Jack Kevorkian did not involve the narrow liberty interest recognized here. Dr. Kevorkian's assistance in the deaths of patients has not been limited either to mentally competent or to terminally ill patients, much less patients who are both competent and terminally ill.

Second, the Michigan statute reviewed by the Michigan Supreme Court has since expired by its own terms. Mich. Comp. Laws § 752.1027. Thus, any conflict that existed has evaporated. This point was made by the State of Michigan itself in its opposition to a petition for writ of certiorari: "The challenged statute no longer exists. In these circumstances, an order declaring its unconstitutionality and enjoining its enforcement would be meaningless." *Hobbins v. Michigan*, No. 94-1473 (October Term 1994), Brief for Respondent in Opposition at 13.

Finally, the need for review by this Court is less than compelling where, as here, a state court ruling that refuses to recognize federal constitutional rights is followed by federal court rulings that consistently protect the asserted federal constitutional rights.

Without even discussing the patently distinguishable nature of that case, it simply does not create a conflict worthy of this Court's attention. Supreme Court Rule 10.1(a).

Petitioners' attempt to create a conflict between the decision below and various state court decisions on the equal protection issue (Petition at 25-26) is misleading. *See supra* note 5. None of the state court decisions involved the constitutional claim of mentally competent, terminally ill adults to choose a humane hastened death by means of self-administering medications prescribed for that purpose. None of the cases reviewed discrimination in that context or held that there is no such equal protection right.

II. REVIEW BY THIS COURT AT THIS TIME IS PREMATURE

In an effort to obtain review, petitioners identify a variety of broad ramifications that may flow from the Ninth Circuit's decision. Petition at 10-11. In fact, however, most of the issues raised, which petitioners themselves argue require consideration by this Court, were not finally resolved by the Ninth Circuit. Issues surrounding patient choice and physician assistance in hastening death continue to be reviewed by lower courts. For example, respondents are aware that at least one case raising similar issues is pending. *McIver v. Krischer*, CL96-1504AF, Palm Beach Circuit Court, 15th Judicial Circuit, Florida.

Sound principles of judicial restraint counsel against granting review at this time. As recognized in *McCray v. New York*, 461 U.S. 961, 963 (1983), denial of certiorari is proper where an issue requires "further study" in lower courts "before it is addressed by this Court." Moreover, this Court need not grant review simply because an issue is important. *See, e.g., Texas v. Hopwood*, 64 U.S.L.W. 3868 (July 1, 1996) (certiorari denied notwithstanding fact that case presented important constitutional questions); *Gilliard v. Mississippi*, 464 U.S. 867, 869 (1983) (Marshall, J., dissenting from denial of certiorari to "those of my colleagues who agree with me that . . . these cases present important constitutional questions, but believe that this Court should postpone consideration of the issue until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem"); *California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 98 (1981) (Stevens, J., dissenting from grant of certiorari on

grounds of traditional practice of avoiding premature adjudication of constitutional principles).⁸

III. THE NINTH CIRCUIT CORRECTLY DECIDED THAT WASHINGTON'S PROHIBITION OF ASSISTED SUICIDE VIOLATES THE FOURTEENTH AMENDMENT'S GUARANTEE OF LIBERTY

The Ninth Circuit carefully reviewed this Court's substantive due process precedent and correctly applied principles developed in those cases. Although petitioners would like to cabin the principles recognized by this Court in the reproductive rights and withdrawal of life support cases to those specific factual contexts, there is no principled way to do so. As the court below recognized, this Court "has carved out certain key moments and decisions in individuals' lives and placed them beyond the general prohibitory authority of the state." *Compassion*, 79 F.3d at 812-13 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (child rearing and education); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (family relationships); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (whether to bear or beget a child); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion)). See also *Zablocki v. Redhail*, 429 U.S. 1089

⁸ Denial of review at this time, of course, would suggest no expression upon the merits of the case. See, e.g., *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950); *United States v. Carver*, 260 U.S. 482, 490 (1923).

The absence of true conflict and the prematurity of review might be overlooked if the Ninth Circuit had clearly gone astray. But, as discussed below, that is not the case. The Ninth Circuit acted en banc and eleven respected judges carefully and exhaustively addressed the issue. Only three judges dissented. Moreover, all three judges on the Second Circuit concurred with the result reached by the Ninth Circuit.

(1977) (marriage); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (family living arrangements). The constitutional tenets developed in these cases are of general application. They can and must be applied to the facts of this case.

A. *Cruzan* Supports the Liberty Interest Recognized Below

The pertinent principle recognized in *Cruzan* is that decisions regarding the end of one's life are "deeply personal" and should be safeguarded from usurpation. 497 U.S. at 281. That principle directly applies here. When a dying patient is mentally competent, as all of the patients represented in this case were and are, and is able to make known his or her wishes regarding the continuation of life, these wishes are entitled to respect and are protected against blanket state suppression.⁹

Ignoring the basic test for determining the existence of a liberty interest set forth by the Court in *Cruzan*, petitioners leap to language in the opinion that suggests a countervailing state interest in preserving life. Petitioners point out that this interest is reflected in state laws banning assisted suicide. Petition at 14. This Court's recognition of a general state interest in preserving life, however, does not suggest that the weight of that interest is the same in cases where a patient is at the threshold of death due to the progress of terminal disease as it is in cases involving the preservation of life for the general population.

⁹ Thus, the real question is whether any state interest outweighs the patient's interest. The Ninth Circuit properly concluded that the state's interests do not outweigh the mentally competent, terminally ill patient's liberty interest in choosing to hasten impending death in a humane and dignified manner. *Compassion*, 79 F.3d at 816-37.

No judgment by the state as to the *quality* of such a patient's life is necessary to recognize that the state's interest does not outweigh the patient's when the patient is terminally ill and mentally competent. This case is limited to patients with a severely diminished life expectancy — a limited *quantity* of life — due to the advance of disease. In recognizing that the state's interest in preserving life is "substantially diminished" in the terminal phase of illness, the court below provided a construct under which relative state and patient interests may be weighed. *Compassion*, 79 F.3d at 820. Petitioners' concern that the court provided no structure (Petition at 15) is unwarranted.

The principle that the state's interest in preserving life weakens as the patient's prognosis dims has been recognized since the seminal case of *In re Quinlan*, 355 A.2d 647, 664 (N.J.), cert. denied, 429 U.S. 922 (1976). This concept is fully consistent with the principle, well established in the reproductive rights cases, that, as the potential for life increases, the state's interest in preserving life increases. See, e.g., *Casey*, 505 U.S. at 846, 860; *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 516 n.14 (1989); *Roe v. Wade*, 410 U.S. at 163.

B. The Reproductive Rights Cases Support the Liberty Interest Recognized Below

The reproductive rights cases, among others, recognize that "there is a realm of personal liberty which the government may not enter." *Casey*, 505 U.S. at 847. These cases acknowledge that decisions concerning one's own body, one's own medical care, and one's own future life course fall within that realm. See, e.g., *id.* at 851. The considerations that led to this conclusion in the reproductive rights context are plainly present in the end-of-life context as well.

The decision regarding the end of one's life is even more personal and significant to an individual than the decision regarding reproduction. Indeed, eight Ninth Circuit judges agreed that "few decisions are more personal, intimate or important than the decision to end one's life, especially when the reason for doing so is to avoid excessive and protracted pain," *Compassion*, 79 F.3d at 813, and that "no decision is more painful, delicate, personal, important, or final than the decision how and when one's life shall end." *Id.* at 837. The court further recognized that

Prohibiting a terminally ill patient from hastening his death may have an even more profound impact on that person's life than forcing a woman to carry a pregnancy to term. . . . For such patients, wracked by pain and deprived of all pleasure, a state-enforced prohibition on hastening their deaths condemns them to unrelieved misery or torture. Surely, a person's decision whether to endure or avoid such an existence constitutes one of the most, if not the most, "intimate and personal choices a person may make in a life-time," a choice that is "central to personal dignity and autonomy."

Id. at 814 (quoting *Casey*, 505 U.S. at 851).¹⁰

The judgment below properly followed *Casey*'s direction that a state may regulate to protect its legitimate interests, and

¹⁰ The district court also recognized this: "the suffering of a terminally ill person cannot be deemed any less intimate or personal, or any less deserving of protection from unwarranted governmental interference, than that of a pregnant woman." *Compassion*, 850 F. Supp. at 1460.

explicitly recognized that the state may protect its interests by regulation of the practice of physician-assisted suicide. *Compassion*, 79 F.3d at 816 ("[W]e explicitly recognize that some prohibitory and regulatory state action is fully consistent with constitutional principles."); *id.* at 833 ("[T]he state should enact regulatory measures that ensure . . . that all necessary safeguards have been provided."); *id.* at 837 ("[T]he process itself [of physician-assisted suicide] can be carefully regulated and rigorous safeguards adopted.").

Petitioners' suggestion that *Casey* is nothing more than a creature of stare decisis is disrespectful to the agonizing effort in *Casey* to craft a reliable middle course for the future and to the values that inform the stare decisis doctrine. The Court in *Casey* did not just blindly apply *Roe v. Wade*; it analyzed fully the constitutional arguments and resolved them with logic that applies with full force to this case. Petitioners' offhand approach in no way avoids the fact that stare decisis requires the application of *Casey* to cases that raise issues it addresses.¹¹

C. Petitioners' Overstatement of the Scope of the Decision Below Is Misguided

As noted above, without a conflict to merit review, petitioners resort to the alarmist tactic of overstating the scope of the Ninth Circuit's decision in order to suggest that terrible

consequences will flow from it.¹² Petitioners suggest that the court's decision affirmatively permits (1) assistance by non-physicians; (2) patients to choose to hasten death solely out of financial motivation; (3) surrogates to direct the hastened death of a mentally incompetent patient; and (4) physician assistance in a form other than prescribing medications for patient self-administration. Petition at 10-11. Each of these contentions is flawed, but they exemplify the wisdom of allowing further development of the law in the lower courts.

1. Assistance by Non-Physicians

In recognizing that a mentally competent, terminally ill patient has a right to choose a certain, humane, and dignified death by self-administering medications prescribed for that purpose, the court below appropriately acknowledged that ancillary actors "whose services are essential" to the exercise of this option "and who act under the supervision or direction of a physician are necessarily covered by our ruling." *Compassion*, 79 F.3d at 838 n.140.

Given the broad wording of the challenged statute, this was necessary to permit patients to exercise the right recognized. The actors within this protected sphere are specifically described and include the pharmacist filling the prescription, the health care workers facilitating the patient's request, and family or loved ones doing such minor acts as

¹¹ Petitioners' argument that abortion is a "unique" act (Petition at 17) does not advance their position. The "unique" aspect of abortion is the decision to terminate a potential life that has no voice in the decision. The related interests and concerns that make the abortion issue difficult and complex are absent here. Foremost among these, the interest of the separate "life that is aborted," *Casey*, 505 U.S. at 852, has no counterpart in the decision of a dying person to hasten his or her own death.

¹² This tactic is often employed by those opposing the recognition of constitutional rights. See, e.g., *United States v. Virginia*, 64 U.S.L.W. at 4645-46 (reviewing history of opposition to women's admission to military schools and observing that none of the forecast terrible consequences had actually occurred).

providing liquid with which to swallow pills.¹³ Nothing in the decision below indicates that non-physicians would be empowered to otherwise assist a suicide or provide the means for hastening death.¹⁴

2. Financial Motivation

The notion that the decision below establishes a liberty interest in hastening death for financial reasons is specious. The Ninth Circuit recognized simply that, among many factors, a patient might consider the economic welfare of his or her family. Current law permits patients to choose to hasten death by refusing (or directing the withdrawal of) life support, notwithstanding the fact that the decision might be motivated by financial concerns. It is not at all clear why the same ability to consider family finances in end-of-life decision-

¹³ Allowing loved ones to be present with the patient at the time he or she hastens impending death eliminates the terrible tragedy of forcing patients who choose to hasten death to act, and die, alone. See, e.g., Timothy E. Quill, *A Case of Individualized Decision-Making*, 324 N. Eng. J. Med. 691, 694 (1991) ("I wonder whether the image of Diane's final aloneness will persist in the minds of her family. . . . I wonder why Diane, who gave so much to so many of us, had to be alone for the last hour of her life.")

¹⁴ In the abortion context, this Court has held that non-physicians who provide abortions could be subject to prosecution. *Connecticut v. Menillo*, 423 U.S. 9 (1975) (criminal abortion statutes can continue to be enforced against non-physicians). The abortion cases and the entire history of restricting the practice of medicine and the power to prescribe medications demonstrate that legislatures have the capacity to use physician-only requirements to protect individuals from abuse. Although it is difficult to determine when such requirements are appropriate, the abortion cases hold that blanket state prohibitions may not deny doctors the freedom to respond to requests from competent patients in narrowly tailored circumstances. Any consideration of broader claims is premature at this juncture.

making should not be available for patients whose conditions do not involve life-sustaining treatment.¹⁵

3. Surrogate Decision-Making for Mentally Incompetent Patients

This case involves only the claims of mentally competent, terminally ill patients, and the Ninth Circuit addressed only the claims of such patients.¹⁶ Contrary to the suggestion of petitioners, however, existing law regarding patients who have lost mental competency does not permit surrogates to make all of the decisions that a competent person could make. For example, a competent patient could direct the withdrawal of life support, regardless of whether he or she was terminally ill. This was the holding in *Cruzan*. By contrast, under Washington law a surrogate can direct the withdrawal of life support from a patient *only* when the patient either is terminally ill or has become permanently unconscious, and

¹⁵ A physician requested to assist in hastening the death of a patient will necessarily inquire into the patient's motivation. In the case of a terminal patient who is neither suffering nor experiencing pain, a physician might well question the competency of a patient making such a request. In addition, safeguards could be set by the legislature to ensure that decisions to hasten death are not the product of coercion.

¹⁶ The court below explicitly limited the protected interest to mentally competent patients. *Compassion*, 79 F.3d at 793 ("We hold that insofar as the Washington statute prohibits physicians from prescribing life-ending medication for use by terminally ill, competent adults who wish to hasten their own deaths, it violates the Due Process Clause of the Fourteenth Amendment."); *id.* at 834 ("[W]hen a mentally competent adult is terminally ill, and wishes, free of any coercion, to hasten his death because his remaining days are an unmitigated torture, that person's liberty interest is at its height."); *id.* at 837 ("[W]e hold that the 'or aids' provision of Washington statute RCW 9A.36.060 is unconstitutional as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians.").

only following requisite confirmation of the patient's condition. *In re Grant*, 109 Wn.2d 545, 747 P.2d 445 (1987) (surrogate may direct withdrawal of life support when patient is terminally ill); *In re Hamlin*, 102 Wn.2d 810, 689 P.2d 1372 (1984) (surrogate may direct withdrawal of life support when patient is permanently unconscious).¹⁷ The language cited by petitioners simply recognizes that once a surrogate is empowered to act on behalf of a patient, the decision of the surrogate "is for all legal purposes the decision of the patient himself." *Compassion*, 79 F.3d at 832 n.120.

4. Expansion to Other Forms of Assistance

Far from "telegraphing the possibility" of the expansion of medical assistance in hastening death to euthanasia, Petition at 10, the Ninth Circuit explicitly stated: "[W]e place euthanasia, as we define it, on the opposite side of the constitutional line we draw for purposes of this case . . ." *Id.* In the constitutional balancing of state and patient interests, the state would appear to be able to articulate significantly greater interests in the case of physician-administered lethal medications.

D. The Ninth Circuit's Analysis of the As Applied Challenge Is Correct

This case focuses on specific conduct by individuals with distinguishing characteristics: the decision of mentally competent, terminally ill adults to hasten death by self-administering medications prescribed for that purpose. This

constitutional challenge was brought because Washington's statute criminalizes the action of a physician assisting a patient in the exercise of this choice. As such, the statute operated to prevent patient plaintiffs Roe, Doe, and Poe — and operates to prevent the mentally competent, terminally ill patients of the physician plaintiffs/respondents — from exercising the option of a humane hastened death. Likewise, those doctors are prevented from providing the care and assistance necessary for their mentally competent, terminally ill patients to exercise this personal choice. *Id.* at 794-95.

Thus, petitioners' contention that this case does not involve the application of the challenged statute to "identified individuals" or "particular fact situations" (Petition at 19) is patently untrue.¹⁸ The court below properly considered whether the application of the challenged statute to the individuals identified above infringed a constitutionally protected right and held that it did.¹⁹ Because the Ninth Circuit resolved this case as an as applied challenge, the *Salerno* test for some facial challenges has no application here and does not create an issue for review by this Court.²⁰

¹⁷ Although the issue was not before the court below, *Cruzan* instructs that if a future case presented the question of a surrogate's ability to direct a hastened death for an incompetent patient, the state's interest in protecting against the usurpation of the personal element of patient choice might well outweigh the asserted interest of the patient.

¹⁸ Petitioners in effect suggest that any suit for anticipatory relief is a facial challenge because it necessarily involves some degree of speculation. This is not, nor has it ever been, the conventional understanding of a facial challenge.

¹⁹ Having found the statute unconstitutional as applied to these identified individuals, the court below indicated that the constitutional infirmity would exist in the case of individuals similarly situated as well. *Compassion*, 79 F.3d at 798 n.9.

²⁰ The Ninth Circuit correctly noted that even if the facial validity of the statute had been ruled on, the *Salerno* test, as articulated in *United States v. Salerno*, 481 U.S. 739, 745 (1987), would not have been applicable. *Compassion*, 79 F.3d at 798 n.9 ("[W]e believe that the

E. The Proper Respective Roles for the Judiciary and the Legislature Are Respected in the Decision Below

Petitioners' argument that the protection of this liberty interest should be left to the legislative process (Petition at 26-28) is fundamentally misguided. Where constitutional rights are infringed it is the essential purpose of the judiciary to protect those rights against majority will and the political process. *See, e.g., Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (where the democratic process impinges on constitutional rights, "the judiciary then has a duty to intervene in the democratic process"); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 670 (1892) (recognizing "duty of this court, from the performance of which it may not shrink, to give full effect to the provisions of the Constitution"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).²¹ As the Ninth Circuit painstakingly delineated, the decision at issue is a highly personal one that must be left to the individual and protected by the courts from legislative action that intrudes excessively into the decision-making realm. The court reiterated the time-honored principle: "The Constitution and the courts stand as a bulwark between individual freedom and arbitrary and intrusive governmental power." *Compassion*, 79 F.3d at 839. On the basis of that constitutional mandate, the Ninth Circuit concluded: "Under our constitutional system, neither the state

nor the majority of the people in a state can impose its will upon the individual in a matter so highly 'central to personal dignity and autonomy.'" *Id.* (quoting *Casey*, 505 U.S. at 851).

CONCLUSION

The judgment below does not present a conflict that merits review by this Court, and review at this time would be premature. The Court has recognized that the constitutional right of liberty stands as a barrier against laws that deny individuals the right to make the most fundamental choices affecting their values and lives. The Ninth Circuit correctly applied this Court's precedent in finding that the Fourteenth Amendment protects the liberty to choose between a tortured death and a humane one, while at the same time recognizing the role of legislative involvement in crafting safeguards to protect the legitimate state interests. For these reasons, the Court should deny the Petition for Writ of Certiorari.

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Salerno test would not in any event be the appropriate one for adjudicating a facial challenge to Washington's prohibition on assisted suicide.").

²¹ None of the cases cited by petitioners (Petition at 27-28) suggest otherwise. Those cases deal exclusively with the regulation of industrial and business conditions, not the suppression of individual liberties. Moreover, those cases recognize that states do not have the power to regulate even commercial affairs when their laws "run afoul of" the Constitution. *See, e.g., Ferguson v. Skupra*, 372 U.S. 726, 729-31 (1963).

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